Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 400

MASCOT OIL COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 27, 1930

CERTIORARI GRANTED OCTOBER 27, 1930

(35,322)

(35,322)

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1930~~

No. 400

MASCOT OIL COMPANY, INC., Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MAY IT PLEASE THE COURT:

Theodore B. Benson, on behalf of Mascot Oil Company, Inc., a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above cause on June 2, 1930.

Statement

The petitioner, a California corporation, filed its tax return for the year 1918 during the month of August 1919 and reported the tax in the amount of $58,138.49 of which $43,603.86 was paid during the year 1919, $330.22 was credited November 16, 1925, from an overassessment from 1917, leaving an unpaid balance of $14,204.41 which was abated April 28, 1926.

In December of 1919, the petitioner filed a claim in abatement in the amount of $17,492.81 and during the month of July, 1920, the Commissioner of Internal Revenue assessed a further tax in the amount of $38,030.51 of which $4,334.38 was paid in 1920, $4,829.49 was abated in 1926, leaving an unpaid balance of $28,846.64. In August, 1920, the peti-
[fol. 2] tioner filed a claim in abatement in the amount of $33,696.13. The claims in abatement in the amounts of $17,492.81 and $33,696.13 were by the Commissioner allowed for $19,053.70 and rejected for $32,135.24.

On September 18, 1925, the petitioner deposited with its bank the sum of $65,000.00 and the bank on October 10, 1925, advised the collector that the amount had been deposited and that the bank was authorized to pay "up to

this amount upon your final determination of the amount due from the Mascot Oil Company as additional tax for the years 1917 and 1918, and that said payment will be made to you upon your demand."

On the following day the petitioner and the Commissioner of Internal Revenue signed an income and profits tax waiver whereby the petitioner waived any period of limitation as to the time within which distraint or a proceeding in court might be begun for the collection of the tax as provided in Section 278(d) of the existing revenue act, the same to remain in effect to December 31, 1926.

On May 28, 1926, the collector made demand on the petitioner for $28,846.64, the unpaid balance of a tax computed by the Commissioner, which sum the petitioner paid to the collector under protest June 8, 1926. Payment was not made by the bank and the collector withdrew all claim to the deposit.

The Statutes Involved

The statutes here involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113); Sections 607 (45 Stat. 874), 611 and 612 (45 Stat. 875) of the Revenue Act of 1928 and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

[fol. 3] Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *."

Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) as applicable here reads as follows:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the tax-payer has overpaid the tax. * * *"

Sections 607, 611 and 612 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

[fol. 4] "Sec. 612. Repeal of Section 1106(a) of 1926 Act.—Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have

been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

A.

The Questions Presented

1. Is the right of the petitioner to recover a sum of money collected from it as a tax after the expiration of the five-year period of limitation for collection prescribed by Section 250(d) of the Revenue Act of 1921, affected by the fact that, after the statute had run, the petitioner made a deposit with its bank with instructions to pay a tax up to the amount of the deposit to the collector, which instructions were communicated to the collector but which deposit was not applied to the payment and the collector, after having collected the sum from the petitioner as a tax, withdrew all claim to the deposit?

[fol. 5] 2. Is the right of the petitioner to recover the amount of a tax, assessed prior to June 2, 1924, but collected after the expiration of the five-year period of limitation for collection prescribed by Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265) affected by the fact that, after the statute had run, the petitioner and the Commissioner of Internal Revenue signed a consent in writing and

agreed to extend the period for collection as defined in Section 278(d) of the Revenue Act of 1924 (43 Stat. 299)?

3. The meaning and construction of Section 611 of the Revenue Act of 1928 (45 Stat. 875), to determine whether the section is to be construed to apply to this case.

4. The constitutionality of Section 611, if construed to apply to this case in which the sum in question was collected as a tax after the enactment of Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) which declares specifically that the bar of the statute of limitations against the United States (Section 250(d) of the Revenue Act of 1921) shall extinguish the liability of the taxpayer.

5. The constitutionality of Section 612 of the Revenue Act of 1928 (45 Stat. 875) which reads that Section 1106(a) of the Revenue Act of 1926 "is repealed as of February 26, 1926" and a determination of the power of a subsequent Congress to repeal Section 1106(a) of the Revenue Act of 1926 as of the date of its enactment.

B.

Reasons for the Allowance of the Writ

1. The court below held as a matter of law that "the liability for the tax still existed" after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921. The only interpretation that can be given [fol. 6] this statement and what the court in fact held is that a sum paid as a tax cannot be recovered because paid after expiration of the statute. This is the principle applied by that court in Toxaway Mills v. United States, 61 Ct. Cl. 363, reversed on confession of error 63 Ct. Cl. 646.

2. The decision of the court below that the petitioner is not entitled to recover because of the deposit made and of the waiver given, which were both after the expiration of the statutory period for collection, conflicts directly with the decision of the Court of Appeals of the District of Columbia in Joy Floral Company v. Commissioner, 29 F. (2d) 865, 58 App. D. C. 277.

3. The question here involved with reference to the effect of the making of the deposit and the giving of the waiver

after the expiration of the statute is similar to the questions presented to this Court in the cases of Charles H. Stange v. United States, No. 23, October Term 1930, Aiken v. Commissioner of Internal Revenue, No. 69, October Term 1930, and W. P. Brown & Sons Lumber Company v. Commissioner of Internal Revenue, No. 115, October Term 1930, in which cases this Court has granted writs of certiorari. The writ should be granted in this case for the same reasons that writs were granted in the cases mentioned.

4. There is no similarity whatever between this case and that of United States v. John Barth Company, 279 U. S. 370, and the court below clearly erred in holding that such case is controlling. The decision of the court below is in fact contrary to the decision of this Court in the John Barth Company case.

5. The holding of the court below that the petitioner cannot recover because the letter from the petitioner's bank to the collector constitutes a valid contract for the payment [fol. 7] of the amount of the tax after the expiration of the statute of limitations conflicts directly with the express provisions of Section 250(d) of the Revenue Act of 1921 which requires for the the extension of the statute of limitations the consent in writing of "both the Commissioner and the taxpayer". This holding of the court below is in direct conflict with the decision of this Court in Botany Worsted Mills v. United States, 278 U. S. 282, 49 S. Ct. 129.

6. The holding of the court below that the waiver, in which Section 278(d) of the Revenue Act of 1924 is referred to and incorporated, is to be construed to apply to this case to extend the period defined in Section 250(d) of the Revenue Act of 1921 conflicts with the decision of this Court in the case of Russell v. United States, 278 U. S. 181, 49 S. Ct. 121.

7. The court below has itself held in the case of Wyman, Partridge & Company, v. United States decided June 2, 1930, that it was beyond the power of a subsequent Congress to repeal Section 1106(a) of the Revenue Act of 1926 as of February 26, 1926, the date of its enactment. This question has also been so decided by the Circuit Court of Appeals for the Third Circuit in Heiner, Collector v. Erie Coal & Coke Company, decided July 9, 1930.

Wherefore it is respectfully submitted that this petition should be granted.

Mascot Oil Company, Inc., by Theodore B. Benson,
Theodore B. Benson, Counsel for Petitioner.

[fols. a & 1] IN THE COURT OF CLAIMS

No. K-67

MASCOT OIL COMPANY, INC., Claimant,

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed February 27, 1929

To the Court of Claims of the United States and to the Honorable the Chief Justice and Judges thereof:

The above-named claimant by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of California, engaged in the business of producing crude oil and having its principal office and place of business at 489 I. W. Hellman Building, Los Angeles, California.

2. The claimant has a just claim against the United States for the refund of $28,826.64, together with interest thereon, paid by it to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, as corporation income and profits taxes for the calendar year 1918, wrongfully collected by the Commissioner of Internal Revenue of the United States.

3. The provisions of law under which such assessment and wrongful collection were made are contained in Sec-
[fol. 2] tions 230 and 301 of an Act of Congress approved February 24, 1919, entitled "An Act to Provide Revenue, and for Other Purposes," and known as the Revenue Act of 1918.

4. The provisions of law on which the claimant claims such refund are contained in Section 250(d) of an Act of Congress approved November 23 1921, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue, and for Other Purposes," and known as the Revenue Act of 1921.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided and on August 16, 1919, on official form 1120 the claimant duly made to the Commissioner of Internal Revenue its return of corporation income and profits taxes for the calendar year 1918, and reported therein as such taxes the sum of $58,138.49, which said sum was paid and discharged as follows: March 10, 1919, $17,500.00, June 14, 1919, $17,500.00, September 16, 1919 $8,603.86, Credit Claim Schedule 17342, $330.22, Abated Schedule 20299, April 28, 1926, $14,204.41.

6. Thereafter the Commissioner of Internal Revenue audited and revised the return so filed and found an additional tax in the amount of $38,030.51, which said sum was by the Commissioner of Internal Revenue assessed during the month of July, 1920, and which said sum was paid and discharged as follows: August 24, 1920, $4,334.38, Abated Schedule 20299, April 28, 1926, $4 849.29, June 8, 1926, $28,846.64, Adjustment $.20.

[fol. 3] 7. On May 28, 1926, the said Collector of Internal Revenue made demand on the claimant for the said sum of $28,846.64, which said demand was accompanied by threat of distraint and seizure and sale of property. Pursuant to such demand and on June 8, 1926, the claimant paid the said sum of $28,846.64 to the said Collector of Internal Revenue.

8. On information and belief the claimant avers that the total of all the sums so paid to the said Collector of Internal Revenue were thereafter by the said Collector turned over to and deposited in the Treasury of the United States of America as in the usual course of said Collector's official business.

9. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant on or about October 28, 1928, duly filed with the Commissioner of Internal Revenue, by causing the same to be de-

posited with the Collector of Internal Revenue, a claim for refund in the amount of $28,846.64.

10. The Commissioner of Internal Revenue considered the said claim for refund and rejected the same by letter dated December 14, 1928.

11. No legally valid waiver, agreement or consent extending the time for collection has at any time been entered into by the claimant and the Commissioner of Internal Revenue.

12. The said sum of $28,846.64, together with interest thereon, is wrongfully withheld from the claimant for the [fols. 4 & 5] reason that it was collected from the claimant under threat of distraint, seizure and sale of property after the expiration of the statutory period within which such collection could be legally made under the provisions of Section 250 (d) of the said Revenue Act of 1921.

13. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. The claimant is and always has been the sole and absolute owner of the claim here presented. It has not made nor attempted to make any transfer or assignment of the said claim or any part thereof or of any interest therein. The claimant is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

14. The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment against the United States of America upon the facts and law for $28,826.64, together with interest thereon from the several dates of said payments and its reasonable costs and disbursements herein.

Mascot Oil Company, Inc., Claimant, by P. E. Spellacy. (Sgd.) Theodore B. Benson, Attorney for Claimant. (Seal.)

Duly sworn to by P. E. Spellacy. Jurat omitted in printing.

[fol. 6] II. General Traverse—Filed April 8, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission of Case

On December 5, 1929, this case was argued and submitted on merits by Mr. Theodore B. Benson, for plaintiff, and by Mr. George H. Foster, for defendant.

[fol. 7] IV. History of Proceedings

On February 17, 1930, the court filed special findings of fact, conclusion of law and opinion by Green, J., and entered a judgment dismissing the petition.

On March 8, 1930, the plaintiff filed a motion for correction of special findings of fact.

On April 14, 1930, the court filed an order amending the special findings of fact, filed February 17, 1930.

On May 13, 1930, the plaintiff filed a motion for leave to file motion for modification of order correcting special findings of fact. Said motion was allowed by the court, May 14, 1930, and said motion for reconsideration of motion for correction of special findings of fact was filed.

V. Order of Court—Entered May 15, 1930

Order

Now on this fifteenth day of May 1930, the motion of the plaintiff for modification of the order heretofore made for correction of the special findings of fact is submitted and sustained, and it is ordered that the findings and opinion heretofore entered in this cause be withdrawn, and the

judgment heretofore entered be set aside, new findings, opinion, and judgment to be rendered hereafter.

By the Court.

[fol. 8] **VI. Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed June 2, 1930

Mr. Theodore B. Benson for plaintiff. Mr. George H. Foster, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Mr. McClure Kelley was on the brief.

This case having been heard by the Court of Claims, the court, in accordance with the stipulation of the parties filed herein, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff is a corporation and in August, 1919, duly filed its corporation income and profits tax return for the calendar year 1918, showing a tax to be due thereon of $58,138.49, which amount was accordingly assessed, and $43,603.86 was paid during the year 1919, $330.22 thereof was credited November 16, 1925, from an overassessment for the year 1917, leaving an unpaid balance of $14,204.41, which amount was abated April 28, 1926.

2. In December, 1919, the plaintiff filed with the collector a claim in abatement for the year 1918 in the sum of $17,492.81, and during the month of July, 1920, the Commissioner of Internal Revenue assessed a further and additional tax against the plaintiff in the sum of $38,030.51, of which $4,334.38 was paid August 24, 1920, and $4,849.49 abated April 28, 1926, leaving an unpaid balance of $28,846.64.

3. In August, 1920, the plaintiff filed a claim in abatement for the sums of $8,664.29 and $33,696.13 covering the years 1917 and 1918, respectively.

4. On September 18, 1925, plaintiff deposited in escrow with the Farmers and Merchants National Bank of Los Angeles the sum of $65,000 to insure payment of the tax finally determined to be due for the years 1917 and 1918.

On October 10, 1925, the said bank addressed a letter to the Collector of Internal Revenue and stated:

"* * * please be advised that the Mascot Oil Company deposited with this bank on September 18th the sum of sixty-five thousand dollars ($65,000.00), and we are authorized by the said Mascot Oil Company to pay you up to this amount upon your final determination of the amount due from the Mascot Oil Company as additional tax for the years 1917 and 1918, and that said payment will be made to you upon your demand."

[fol. 9] 5. On the day following that on which the deposit was made in the bank, as hereinabove recited, the plaintiff and the commissioner signed an income and profits tax waiver, whereby the taxpayer waived "any period of limitation as to the time within which distraint or a proceeding in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act for the years 1917 and 1918, the same to remain in effect until December 31, 1926. On March 29, 1926, the plaintiff signed and forwarded to the Commissioner of Internal Revenue a "waiver of right to file a petition with the U. S. Board of Tax Appeals * * * under section 274 (a) of the revenue act of 1926," and consented to the assessment and collection of a deficiency in tax for the year 1918 aggregating $29,177.06. A proviso was attached thereto that the waiver did not extend the statute of limitations for refund or assessment of the tax and that the waiver is not an agreement as provided under section 1106 of the revenue act of 1926.

6. The claim in abatement filed in December, 1919, in the sum of $17,492.81, and also the claim in abatement filed in August, 1920, for $33,696.13 for the year 1918, were allowed for $19,053.70 and rejected for $32,135.24.

7. On May 28, 1926, the collector made demand on the plaintiff for the sum of $28,846.64 representing unpaid balance of taxes alleged to be due for the year 1918, which the plaintiff paid under protest on June 8, 1926. Whereupon the collector withdrew all claim upon the deposit which had been made to guarantee payment for such tax.

8. On October 28, 1928, the plaintiff duly filed a claim for refund in the amount of $28,846.64, being the amount of additional taxes paid for the year 1918 as aforesaid. The ground of the claim for refund was that the taxes were collected after the expiration of the period of limitation. This claim for refund was rejected by the commissioner.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This action is begun to recover taxes which had been paid after the period of limitations had run against their collection. Counsel for plaintiff supports its case by the same line of argument that was presented to this Court in Oak Worsted Mills v. United States, 68 C. Cls. 539, and Gotham Can Co. v. United States, 68 C. Cls. 749, in both instances adversely to the plaintiffs therein. In the Oak Worsted Mills case, supra, we held that sections 607 and 611 of the [fol. 10] act of 1928 prevented a recovery. In the Gotham Can Co. case, supra, we held that section 1106 (a) of the act of 1926 was of no benefit to the plaintiff where the taxes in question had been collected prior to the time when the revenue bill of 1926 went into effect unless it was shown that the taxes were overpaid. It was expressly stated, however, in that decision that the court did not pass on the effect of the provision in the revenue bill of 1928 which repealed section 1106 (a) of the act of 1926 as of the date of its enactment. In the case at bar, it appears that the taxes in controversy were collected after the 1926 act went into force. The decision in the Gotham Can Co. case is therefore not controlling herein because it does not determine the construction or effect of section 1106 (a) when the

taxes were collected after the period of limitations had expired and the 1926 act was in force. But we do not find it necessary to determine the question left open by the Gotham Can Co. case for the reason that the defendant sets up an entirely new and different defense from anything pleaded in the two cases cited above and insists that the facts shown in support of this defense are sufficient by themselves and alone to warrant a judgment in its favor.

This defense is that the evidence shows that the plaintiff had made a deposit in a bank as a guarantee of the payment of the taxes in controversy when finally determined. In consideration of this deposit, the bank advised the collector of internal revenue that it would pay the amount of taxes finally determined by the commissioner to be due from the plaintiff, the case was held up until determination had been made, and thereafter when such taxes were finally determined the plaintiff paid the amount thereof and obtained a release of the deposit. The defendant contends that the principles laid down in the case of United States v. John Barth Co., 279 U. S. 370 in any event prevent the plaintiff from recovering the refund in controversy. In that case the Government brought suit to enforce a bond given by the defendant and its surety for the payment of taxes, and the defense was made that payment was exacted after the collection of the tax was barred by the statute of limitations. The court said that neither the statute of limitations nor section 1106 (a) of the revenue act of 1926 applied to an action upon a bond, and the signers of the bond were not relieved from the obligation arising out of that instrument. The court further said that—

"* * * the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."

Judgment was accordingly rendered against the taxpayer.

It is true that in the case last cited the bond was filed prior to the time when the statute of limitations expired and in the instant case the deposit was made in the bank and the guaranty given of payment after the statute had

run against the collection of the tax. We are nevertheless clear that this does not alter the situation, and that the principles announced in the John Barth Co. case, supra, determine the case at bar. In the instant case, the deposit was made and the guaranty given prior to the enactment of the 1926 act. Conceding for the purposes of the argu- [fol. 11] ment only that when the 1926 act was passed, section 1106 (a) thereof extinguished the liability for taxes collected after the statute of limitations had run and enabled a suit to be brought to recover the amount paid, it still must be said that the liability existed prior to the enactment of that act. In fact, the passage of section 1106 (a) showed that Congress recognized that the liability did exist. This, as we observed in the Gotham Can Co. case, was in pursuance of the well-known principle—so well established as to need no citation of authorities—that the statute of limitations or other bar against a remedy for the collection of a debt does not extinguish the liability therefor.

As the liability for the tax still existed at the time when the deposit was made in the bank for its payment, the contract which the bank made to pay whatever amount might finally be determined to be the tax, was made upon a valid consideration both as to the plaintiff and the bank. The bank did not, it is true, pay the tax itself as the agreement provided. The plaintiff paid the tax and thereby discharged the liability of the bank. But whether paid by plaintiff or the bank, the result was the same. The collection was not made on the ground that a tax was due, but was based on a valid contract to pay a certain amount when it was determined by the commissioner. The tax fixed the sum to be paid, but the payment and collection was by virtue of the contract and not by reason of the tax liability, and the payment therefore cannot be recovered by plaintiff. We hardly think it is necessary to cite authorities to show that the moral obligation to pay a valid debt is sufficient legal consideration for a subsequent new promise to pay if made either before or after the bar of the statute has become complete and that the new promise based upon such moral obligation is binding upon the debtor and may be shown in avoidance of the statute of limitations. But see the numerous decisions, both State and Federal, listed on this point under section 569, page 1099, of 37 Corpus Juris.

Counsel for plaintiff urge that the waiver which was executed the day following that on which the deposit was made in the bank is invalid, first, because it was executed after the statute of limitations had run, and, second, because it was so restricted by its terms as not to apply to the conditions in the case at bar. But these matters do not affect defendant's right to retain the money paid pursuant to the guaranty. While we have no necessity for considering them, it might be said that in the case of Charles H. Stange v. United States, 68 C. Cls. 395, we held that a waiver was not invalid simply for the reason that it was executed after the expiration of the period of limitations.

Without considering the other questions arising in the case, we hold that by reason of the deposit and guaranty the plaintiff is not entitled to recover herein and it is ordered that its petition be dismissed.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 12] VII. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the 2nd day of June, A. D. 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

[fol. 13] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,322. Court of Claims. Term No. 400. Mascot Oil Company, Inc., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 27, 1930. File No. 35,322.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 27, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.